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Supreme Court, U.S.
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No. 00-842

In the Supreme Court of the United States

JOHN J. HOWARD,

Petitioner,

v.

E.I. DUPONT DE NEMOURS AND COMPANY, PENSION RETIREMENT PLAN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Can a plaintiff prevail on ERISA fiduciary duty and discrimination claims absent "serious consideration" of a plan offering at the time the statements at issue are made, or material misrepresentations of then-existing facts by an employer-fiduciary?

2. Whether the magistrate judge, the district court and the Sixth Circuit Court of Appeals properly decided the issues of liability.

3. Whether this case presents a basis for this Court to exercise its certiorari powers.

CORPORATE DISCLOSURE

Respondent E.I DuPont de Nemours and Company is a publicly traded company, which has no publicly traded parent or subsidiary companies.

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OPINIONS BELOW

While the Petitioner has noted that the trial of the underlying matter was conducted before a magistrate judge, the Petitioner has curiously failed to cite to the Court that detailed decision or include it in an appendix. Accordingly, a copy of the Report and Recommendation of the Magistrate Judge from the United States District Court for Southern District of Ohio (Eastern Division) is included in Appendix 1 at 1a-31a.

STATEMENT OF THE CASE

Petitioner's Statement of the Case includes numerous misstatements and omissions of fact. Accordingly, Respondents offer the following as a correct account of the facts in this case.

A. Background To The CTP Offering

Petitioner was a former senior supervisory employee within the Respondents' Mylar operations at its Circleville, Ohio facility. Because the Circleville plant had four separate businesses on-site, Circleville management traditionally had a significant degree of flexibility in dealing with all site issues. (Respondents' Appendix 1 at 3a). Nowhere was this flexibility more apparent than in how the facility historically dealt with economic downturns in its business lines. While Circleville's sister plants -- which had only one business -- generally had to participate in early retirement incentives to meet these economic declines, the Circleville facility historically preserved DuPont jobs through a combination of natural attrition and redeployment. (*Id.* at 4a).

Circleville's ability to preserve everyone a job within DuPont did not diminish the efforts of many of its senior employees to continually explore whether retirement incentives would be offered at the Circleville plant. Indeed, as the magistrate judge noted, "the issue of early retirement incentives was raised at virtually every meeting of supervisors . . . . " (*Id.* at 6a). While the Petitioner claims that Respondents' representatives made unequivocal statements that no such offerings would be made (Petition at 2), the statements made by DuPont management were far less unequivocal, and as the magistrate judge noted, were accurately conditioned on the Circleville plant maintaining its significant attrition rate. (Respondents' Appendix 1 at 6a).

There is no dispute that the financial performance of DuPont's Mylar operations was weak during the first quarter of 1993. (*Id.* at 4a). Not surprisingly, these economic concerns were addressed at the Mylar strategic quarterly meeting that took place on May 6-7, 1993 -- a week before the Petitioner's long-announced retirement date. (*Id.* at 8a). At that meeting, the group, which included the Circleville plant manager, Lynn Millikin, conducted a "brainstorming" session where 28 separate suggestions were made so that the Mylar operations could get "ahead of the competitive curve." (*Id.* at 9a). No decisions were made at this meeting, and a sub-group met one week later "to consider various methods to reduce the cost structure of" the Mylar operations. (Petitioner's Appendix B at 12a). At that meeting, it was decided that the plant managers would perform a "zero-based restructuring analysis," under which they would examine the functions of their facility and these related costs, and then eliminate those functions that were not cost-effective. (*Id.*). The testimony was undisputed that, throughout this period, Lynn Millikin, who had decision-making authority over the Circleville facility, did not believe that Circleville would need

to eliminate any employees from its rolls, but that the facility could, as it had done historically, deal with the economic downturn through natural attrition and redeployment. (*Id.* at 13a).

B. The Decision To Use CTP At The Circleville Plant

Lynn Millikin began the zero-based restructuring on May 14, 1993, and by May 19, 1993, had summarized the preliminary results of this analysis. (*Id.* at 14a). This review indicated that Circleville in fact could not meet its economic targets through its traditional means, but would have to eliminate employees from its rolls. Because the de-selection tool to be used contemplated that younger employees would be eliminated, Millikin concluded that he could not meet the economic targets because it would "mortgage the future of Circleville." (*Id.*). Recognizing the problems that confronted the Circleville plant, on May 21, 1993, the Mylar human relations director requested that DuPont's director of human resources consider allowing senior employees to "volunteer" to take the positions of junior employees whose positions were going to be eliminated. (*Id.*).

On May 24, 1993, the Mylar sub-group met again to review the results of the zero-based restructuring. (*Id.*). During the course of that meeting, the group was informed "that DuPont agreed that plant managers could seek 'expressions of interest' from non-excess personnel if the CTP were used at any plant." (*Id.*). The evidence was undisputed that it was at this point -- ten days after the Petitioner had retired -- that Millikin (the ultimate decision-maker) first believed that the CTP could even be offered at the Circleville plant. (*Id.*). Subsequently, on June 11, 1993, the Circleville plant determined to meet its economic targets through a

reduction in force, and accepted senior employees' expressions of interest. (*Id.* at 15a). On June 20, 1993, thirty-one senior employees were removed from the rolls at Circleville with CTP benefits. (*Id.*).

C. The Decisions Of The Courts Below

Based upon this factual record, the magistrate judge recommended that judgment be entered on behalf of Respondents, as it was not until May 24, 1993 -- ten days after the Petitioner's voluntary retirement -- "that the CTP proposal was sufficiently concrete to support consideration by those with authority to implement it . . . . " (Respondents' Appendix 1 at 27a). The Petitioner timely appealed to the United States District Court for the Southern District of Ohio, which, after conducting a *de novo* review of the magistrate judge's findings, rejected each of the Petitioner's eight objections. (Petitioner's Appendix B at 15a - 28a). After properly giving deference to the "District Court's credibility findings," the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court. (Petitioner's Appendix A at 4a - 5a).

ARGUMENT

A. There Is No "Split" Among The Circuits On The Issue Presented In This Case

In an effort to obtain certiorari review, Petitioner contends that:

> different courts have set different standards regarding when an employer-fiduciary violates a fiduciary duty under ERISA while making

representations to employee-beneficiaries . . .

(Petition at 9). Not only is the Petitioner's lone basis in support of review overly simplistic, but it is factually inapposite to the case presented below.

At the outset, as Petitioner correctly notes, the magistrate judge, district court and Sixth Circuit Court of Appeals applied what has commonly been referred to as "the serious consideration doctrine" to its analysis of Petitioner's fiduciary duty and discrimination claims under the Employee Retirement Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (1994). Under this doctrine, an employer's fiduciary duties are not triggered until it "seriously considers" the implementation of a new plan or a change to an existing one. *McAuley v. IBM Corp.*, 165 F.3d 1038, 1043 (6th Cir. 1999). This rule is an attempt to balance the right of employees to have factually accurate information, with the statutory mandate that employers owe no fiduciary duty to employees in deciding whether to adopt, modify, implement or terminate a benefit plan. *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992). It also recognizes that employers do not have a "'duty of clairvoyance,' i.e., to predict accurately the future availability of benefits." *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988). Thus, as the Sixth Circuit cogently explained:

> Congress' main purpose in imposing a disclosure requirement on ERISA fiduciaries was to ensure that 'employees [would have] sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended.' H.R. Rep. No. 533, 93rd Cong., 2d Sess. VI (1974) reprinted in 1974 U.S.C.C.A.N. 4639.

> Insisting on disclosure during the formulation of a plan and prior to its adoption would increase the likelihood of confusion on the part of beneficiaries. At the same time management would be unduly burdened by the continued uncertainty of what to disclose and when to disclose it. Moreover, any requirement of pre-adoption disclosure could impair the achievement of legitimate business goals.

Muse v. IBM Corp., 103 F.3d 490, 494 (6th Cir. 1996).

Recognizing these competing considerations, the Sixth Circuit has adopted two related tests of serious consideration. Under the first, serious consideration does not exist until a company focuses on a "particular plan for a particular purpose." *Id.* Recently, the Sixth Circuit refined the standard so that serious consideration occurs when three factors converge: (1) a specific proposal (2) discussed for purposes of implementation (3) by senior management with authority to implement the change. *McAuley*, 165 F.3d at 1043-44. The initial two factors insure that liability is not imposed on employers who are simply engaged "in the antecedent steps of gathering information, developing strategies, and analyzing options." *Fisher v. Philadelphia Elec. Co. (Fisher II)*, 96 F.3d 1533, 1539-40 (3d Cir. 1996); *see also Muse*, 103 F.3d at 494. The final element ensures that the analysis focuses on the proper actors within the corporate hierarchy. *Fisher II*, 96 F.3d at 1540. Thus, under the serious consideration doctrine, statements made before an employer seriously considers a plan modification are not material, and thus not actionable as a breach of fiduciary duty or ERISA discrimination.

As the serious consideration doctrine does in fact balance the competing interests contemplated by Congress in promulgating ERISA, it has been embraced throughout the Circuits. *See Binns v. Exxon Company U.S.A.*, 220 F.3d 1042, 1049 (9th Cir. 2000) *(en banc)* ("We similarly believe that *Fisher II's* serious consideration test is the proper tool for ensuring that an ERISA employer-fiduciary discharges its 'duties with respect to a plan solely in the interest of the participants and beneficiaries'"); *Vartanian v. Monsanto Co.*, 131 F.3d 264, 272 (1st Cir. 1997); *Hockett v. Sun Co., Inc.*, 109 F.3d 1515, 1523 (10th Cir. 1997); *Fisher II*, 96 F.3d at 1538; *Wilson v. Southwestern Bell*, 55 F.3d 399, 405 (8th Cir. 1995); *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir. 1991).

In the face of this overwhelming weight of authority, Petitioner claims that these holdings "squarely conflict with the holding of the Second Circuit" in *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 122 (2d Cir. 1997).[1] (Petition at 9). The Petitioner's sole claim is not only legally in error, but it is, as the courts below have found, factually unsupportable. In *Ballone*, the plaintiffs had alleged that during the time Kodak was considering downsizing its

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[1] The Petitioner also claims that "there is evidence that the First and Ninth Circuits are at least sympathetic to *Ballone*." (Petition at 14). To the contrary, in *Vartanian*, the First Circuit Court of Appeals expressly adopted the serious consideration doctrine, but emphasized the flexibility inherent in the *Fisher II* test, noting that the ultimate issue was whether it appeared from the totality of circumstances that an enhanced benefit package was being offered. *Id.*, 131 F.3d at 272. Similarly, in *Binns*, while the Ninth Circuit Court of Appeals agreed with the First Circuit's approach, it made clear its continued adherence to the serious consideration doctrine. *Id.*, 220 F.3d at 1049.

operations, the company falsely assured certain employees that no retirement plan enhancements would be made during 1991, and that future downsizing would not occur until 1992. *Id.* at 121. Based upon these alleged misrepresentations, the plaintiffs retired shortly before the retirement incentives were offered in August 1991. *Id.* The district court found that because Kodak did not seriously consider implementing the retirement incentives until July 25, 1991, no misstatements made prior to that date were "material." *Id.*

On appeal, the Second Circuit Court of Appeals focused its analysis on the allegations that Kodak had intentionally misinformed plan beneficiaries about the availability of retirement incentives to induce them to retire. *Id.* at 124. According to the Second Circuit, "[w]here an ERISA fiduciary makes guarantees regarding future benefits that misrepresent present facts, the misrepresentations are material if they would induce a reasonable person to rely upon them." *Id.* at 122. Thus, the Second Circuit's analysis focused on how to determine "the materiality of false assurances like those here alleged." *Id.* at 125. In undertaking this analysis, the Second Circuit made clear that while serious consideration of the plan implementation did not have "talismanic" significance, it was one factor to consider, along with the employees' knowledge of other information regarding the plan offering and the specificity of the assurances. *Id.* at 122, 125. As the Second Circuit made clear, "[w]hereas mere predictions are not actionable, false statements about future benefits may be material if couched as a guarantee, especially where, as alleged here, the guarantee is supported by specific statements of fact." *Id.* at 125.

Thus, careful scrutiny of *Ballone* makes clear that the serious consideration analysis should be supplemented only in those rare instances where it is alleged that knowingly

material misrepresentations were made to induce plan beneficiaries to act. *See Binns v. Exxon Company U.S.A.*, 189 F.3d 929, 936 (9th Cir. 1999) ("Indeed, in many cases, applying the serious consideration test will resolve a case without further inquiry"). And, if any question remained as to the limited applicability of the *Ballone* analysis, the Court need look no further than what transpired in the wake of *Ballone*. On remand, the district court applied the Second Circuit's materiality test to the facts presented. *Radley v. Eastman Kodak Co.*, 19 F. Supp. 2d 89, 99 (W.D.N.Y. 1998). Of particular note, the district court reaffirmed that at the time the alleged representations were made, Kodak was not seriously considering the retirement incentive. *Id.* at 100. The district court then went on and analyzed the alleged misstatements made to the plaintiffs, and concluded that:

> None of the five plaintiffs have testified that Kodak representatives gave them guarantees or assurances supported by specific statements of fact. These plaintiffs do not allege that any counselor told them changes had been ruled out for any specific period of time or, more importantly that a corporate decision had been made not to amend the plan. No plaintiff testified that his/her counselor stated that the plan could not change for specific reasons such as government regulations or financial considerations. Rather all five plaintiffs allege that the counselors' representations were general statements such as 'no changes are coming in the foreseeable future,' which were true when made but which later turned out to be incorrect when the company subsequently announced [the plan modification].

Id. at 103. Based upon this record, under *Ballone* the district court found that no "material misrepresentations" were made to the plaintiffs, and thus their claims for breach of fiduciary duty and discrimination were dismissed. *Id.*

Claiming that the district court had ignored the *Ballone* holding, the plaintiffs again appealed the decision to the Second Circuit. There, the Second Circuit not only affirmed the district court's decision, but acknowledged the limited reach of its previous ruling. *Radley v. Eastman Kodak Co.*, 1999 U.S. App. LEXIS 23372 (2d Cir., Sept. 24, 1999). In *Radley*, the Second Circuit confirmed that *Ballone* was confined to the limited situation where a plaintiff can support a claim of material misrepresentation of a then-existing fact. *Id.*, *2-3.; *see also Hudson v. General Dynamics Corp.*, 118 F. Supp. 2d 226, 273 (D. Conn. 2000) (holding under *Ballone* that absent knowingly material misrepresentations, statements made prior to serious consideration of a plan offering are not actionable). The situation was not presented in *Radley* or *Hudson*, nor was it presented in the case now before this Court.

B. Petitioner's Attempt To Bring This Case Within The Limited Reach Of *Ballone* Is Unavailing

Obviously recognizing the limited reach of *Ballone*, Petitioner attempts to squeeze the facts presented within the constraints of the Second Circuit's modification of the serious consideration analysis. Not surprisingly, this effort is unavailing. While Petitioner contends that DuPont made misstatements that he relied upon, and that the law of the Sixth Circuit -- and of all others -- is but a "license to lie", this rhetoric is not only misplaced, but it is unpersuasive. (Petition at 9). Indeed, contrary to Petitioner's claims, the

courts below made clear that no material misrepresentations were made by DuPont's representatives prior to May 14, 1993, the date of his retirement. As the magistrate judge found, Petitioner's lone claim of misrepresentation stemmed from questions he raised after he signed his retirement papers in February 1993, about the availability of retirement incentives, which had never been necessary at the Circleville facility. (Respondents' Appendix 1 at 4a, 6a). In response to these inquires, the magistrate judge found that the evidence concluded that "plaintiffs were told that it was not foreseeable that CTP would be offered in light of the hiring opportunities and anticipated rate of attrition at Circleville." (*Id.* at 29a n.11).

Petitioner does not, however, contend before this Court, nor has he ever, that these statements were knowingly false, i.e. misrepresentations of then existing facts.[2] Indeed, based upon the considerable record adduced below, Petitioner could not make such a claim. As the magistrate judge and the district court properly concluded, up until well after Petitioner had retired from DuPont, Lynn Millikin, the ultimate decision-maker on retirement modification had no reason to

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[2] The closest that Petitioner comes to making this contention is his reliance upon the testimony of Robert J. Dillard that these representations should not have been made. (Petition at 8). In fact, the magistrate judge rejected Petitioner's reliance on this testimony as Mr. Dillard had no role in the decision to implement the retirement offering and reached his conclusion after the relevant decisions had been made. (Respondents' Appendix 1 at 22a-23a). As the magistrate judge concluded, "[t]his *post hoc* justification, made by one not involved in the decision-making process, simply is not determinative of the issue . . . . " (*Id.* at 23a). Similarly, the district court expressly discounted Mr. Dillard's testimony. (Petitioner's Appendix B at 25a).

believe that the offering would be made at the Circleville facility, or that it could even be made available to senior employees such as Petitioner. (Respondents' Appendix 1 at 11a - 14a, 21a - 27a; Petitioner's Appendix B at 15a - 18a). Therefore, even under the *Ballone* analysis, the representations made by DuPont's representatives were not misrepresentations of then-existing facts, and in fact, were truthful and accurate statements of what DuPont's management believed at the time. Thus, these statements were not actionable under ERISA. *Radley*, 1999 U.S. App. LEXIS 23372, *5 ("Nowhere in *Ballone* does this Court hold that all misleading statements are material misrepresentations"). Thus, while the courts below did not explicitly apply the *Ballone* standard to their determinations, based upon the factual record, such an analysis was not only unwarranted, but would have yielded the same result -- judgment on behalf of Respondents.

CONCLUSION

Based upon the forgoing, the Court should deny the Petition for Writ of Certiorari.

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed March 22, 1999]

Civil Action No. 2:94-CV-1265

JACKIE L. BRADNEY, et al.,
Plaintiffs,

v.

EI DU PONT DE NEMOURS AND COMPANY, Pension and Retirement Plan, et al.,
Defendants.

Judge Kinneary
Magistrate Judge King

REPORT AND RECOMMENDATION

Plaintiffs Jack Bradney and John Howard, former senior supervisory or exempt, employees of defendant E.I.

DuPont de Nemours and Company ["DuPont"] at its Circleville, Ohio, plant ["Circleville"], bring this action pursuant to the Employee Retirement Income Security Act of 1974 ["ERISA"], 29 U.S.C. §1001, *et seq.*, alleging claims of breach of fiduciary duty, discrimination and equitable estoppel in connection with DuPont's offer of a Career Transition Plan ["CTP"] at Circleville subsequent to plaintiffs' retirement. With the agreement of the parties, *Order* (August 10, 1998), a trial to the Court was held before the undersigned on December 1-3, 1998. The Court now makes the following recommended findings of fact and conclusions of law.

FINDINGS OF FACT

I

Plaintiffs' claims arise in connection with DuPont's implementation of a CTP at Circleville the month after plaintiffs' May 1993 retirements. The CTP included an offering of certain financial benefits known as Career Transition Financial Assistance ["CTFA"] to employees involuntarily separated from employment with DuPont. CTFA benefits included, *inter alia,* severance pay equal to one month's salary for every two years of service, with a minimum of two months' salary up to a maximum of twelve months' salary. Plaintiffs claim that, had they known of the impending CTP, they would not have retired when they did and would have been eligible to participate in the CTP and to receive the maximum CTFA benefits. Specifically, the case at bar centers on plaintiffs' allegations that DuPont misled them as to the status of its decision to implement the CTP at Circleville. As Judge Kinneary stated in its May 6, 1998 *Opinion and Order,* the resolution of plaintiffs' claims turns

on the issue of when DuPont first "seriously considered" the use of CTP at Circleville.

A. DuPont Organizational Structure

In 1993, DuPont's various divisions were organized into "strategic business units" ["SBUs"], semi-autonomous structures which were responsible to DuPont for a financial performance at a predetermined level. The Films SBU was comprised of eight manufacturing locations, including Circleville and a plant in Florence, South Carolina, that manufactured film-based products, including Mylar.

Michael Hartnagel, the former vice-president and general manager of the Films SBU, testified on deposition that the SBU held each plant accountable for a certain portion of the SBU's financial commitment to DuPont. Thus, Circleville's plant manager in 1992 and 1993, Lynn Millikin, was responsible not only for such matters as the safety of employees and the environmental security at Circleville, but also for meeting Circleville's financial commitment to the Films SBU. According to Hartnagel and Millikin, plant managers were delegated a great deal of authority and responsibility in determining how best to achieve their respective profit objectives.

B. The Circleville Site

Circleville had at least four businesses on-site. In addition to the Mylar line, Circleville also engaged in the "Teijin Joint Venture," the "Captar" business and a line of safety glass. The Mylar line accounted for approximately ½ of the site's operations; most, but not all, of the businesses fell within the Films SBU.

The presence of these various business lines at Circleville conferred a great deal of flexibility on Millikin in his execution of management decisions. For example, although the Florence plant, which had only a Mylar line, had participated in early retirement incentive programs in the early 1990s, Circleville did not; the combination of attrition (historically, 35 employees per year) and redeployment of personnel to other business lines at the plant enabled Circleville to meet its profit objectives without utilizing such programs.

C. Financial Climate for Mylar and the Films SBU in 1993

The evidence is undisputed that the financial performance of the Mylar business of the Films SBU for the first quarter of 1993 was weak. Historically, the weakest two months of the year have been January and February; however, the weak March result came as a surprise. By early April 1993, following receipt of these first quarter results and after consulting with DuPont global business leaders who suggested that the remainder of 1993 would see continued difficulty in the Mylar business, Hartnagel concluded that the Films SBU could fall short in its financial commitment to DuPont by as much as $20 million.

Millikin testified that, during the first quarter of 1993, Circleville had met all its spending objectives but had not met its cost objectives; the site was overspending by $300,000.00 per month. He regarded as "essential" the goal of meeting the plant's profit objective for 1993. *See Plaintiffs' Exhibit 8.*

D. Programs to Effect Personnel Reductions

Until 1993, DuPont utilized a "Voluntary Separation Program" and a "Voluntary Retirement Incentive" ["VSP/VRI"] to effect reductions in personnel. The programs contemplated voluntary participation, for which financial incentives were offered. In 1991 and 1992, VSP/VRI effected a $1 billion company-wide cost reduction by which 10,000 employees left DuPont. In October 1992, it was announced that VSP/VRI would be replaced by CTP effective January 1, 1993. *Plaintiffs' Exhibit 40.*

Corporate documents announcing CTP, while not detailed, did not eliminate, and indeed appear to contemplate, a component of volunteerism in the application of CTP. *Plaintiffs' Exhibits 40, 56, 70.* Nevertheless, and unlike VSP/VRI, CTP, was designed as a management selection tool and was intended to give management greater control over employees and employee skills affected by reduction in personnel. The program contemplates the redeployment of excess personnel to another position in DuPont or, if necessary, to assist excess personnel in obtaining work outside DuPont. In addition to training and outplacement services, CTP also offered financial benefits through the CTFA. Thus, participating employees with at least 24 years of DuPont service would qualify for a CTFA payment equivalent to an additional year's salary.

E. Plaintiffs' Claims

Jack Bradney

Plaintiff Bradney had been employed at Circleville for more than 30 years when he retired on May 14, 1993. At the time of his retirement, Bradney was an area specialist in

Mylar. Bradney knew that VSP/VRI had been authorized at other DuPont plant sites and, as he approached retirement age, he became interested in any retirement incentives for which he might qualify.

The issue of early retirement incentives was raised at virtually every meeting of supervisors, notwithstanding the publicized cautions that CTP was not to be used or viewed as a benefit to which an employee was entitled. According to Bradney, the universal response, made at various times by Hartnagel, Ben Waide, Director of Operations of the Films SBU, and Greg Funari, the former Operations/Technology Manager for Circleville's Mylar operations, was that, as long as Circleville was hiring for the Teijin Joint Venture, and as long as Circleville sustained its traditional attrition rate, there would be no personnel "excess," and Circleville would "never" offer an early retirement incentive.[1]

In February 1993, and based on these representations, Bradney signed his retirement papers. He continued to inquire about early retirement incentives in the following months, with the same response. His retirement became effective on May 14, 1993.

In late June 1993, Bradney learned of the implementation of the CTP. During the course of his ensuing attempts to participate in the program, Bradney and another retiree, Hobart Holbrook, met in Circleville with Waide. According to Bradney and Holbrook, Waide pointed to his calendar and stated that retirement incentives had been discussed at a meeting held on May 6 and 7 in Baltimore and

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[1] Funari, Waide, Millikin and others could not recall using the word "never" in their discussions with Bradney or any other employee.

that the CTP program had been finalized on May 12, 1993. In fact, Waide told Bradney that, at the May 12 meeting Millikin had mused, "How would he explain this to Mr. Holbrook?"[2]

Following his meeting with Waide, Bradney wrote a letter to Hartnagel, *Plaintiffs' Exhibit 71*,[3] expressing Bradney's belief that he had been mislead and should be given the benefits of the retirement program. Michael Carroll, then Human Resources Manager for the Films SBU, responded that, at a meeting of plant managers held in Wilmington on Monday, May 24, 1993, it became evident for the first time that restructuring at Circleville would be of such a magnitude that it could not be dealt with through normal attrition; it was only then that the decision to implement the CTP was made. *Plaintiffs' Exhibit 85*. According to Carroll, there was no program to which plaintiff Bradney was entitled or for which he was eligible.

Bradney's salary in early 1993 was $50,000.00 per year. Had he been employed at Circleville when the CTP was actually implemented, he would have been able to participate in its financial benefits.

John Howard

Plaintiff Howard, too, had been interested in an early retirement incentive. After learning that the VSP/VRI programs would be replaced by the CTP, *Plaintiffs' Exhibit 40*, and after discussions with Mary Moore, his supervisor

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[2] Waide denied identifying May 12 as the date that CTP was finalized.

[3] Although addressed to Waide, the letter was actually sent to Hartnagel.

and, perhaps with Robert Dillard, Moore's supervisor, Howard was convinced that there would be no early retirement incentives at Circleville. He retired after more than 30 years of service, on May 10, 1993. However, had he known of the CTP that was eventually offered, he would have remained employed in order to take advantage of the CTFA benefits. Had he done so, the preponderance of the evidence would indicate that he would have been able to participate in its CTP and its financial benefits.

F. Evidence on the Decision to Implement CTP at Circleville[4]

Plaintiffs contend that defendants seriously considered implementing CTP at Circleville, if not at a meeting held on May 6-7, 1993, then no later than May 12, 1993. Defendants take the position that it was not until May 24, 1993, *i.e.*, after the retirement of both plaintiffs, that the implementation of CTP at Circleville was seriously considered.

The SBU's quarterly meeting held on May 6-7, 1993, in Wilmington, Delaware, was attended by its Strategic Leadership Team, including Millikin, who took with him to the meeting a report prepared by Funari on the anticipated rate of attrition at Circleville. The participants focused singularly on financial performance; each business leader reviewed his full year forecast. Hartnagel, who presided over the meeting, directed the participants to engage in a brainstorming session of actions that might avert the expected

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[4] Plaintiffs offered the deposition testimony of James K. Marshall, Earl Tatum, Donald Meenach, and Roger Valentine, to which defendants have objected. Because the proffered testimony is either irrelevant to the resolution of plaintiffs' claims, or hearsay, or both, defendant's objections are SUSTAINED.

revenue shortfall. Moreover, Hartnagel wanted to get "ahead of the competitive curve," *i.e.*, explore fundamental changes that could avoid the need to restructure year after year.

The brainstorming sessions generated 28 different suggestions. No consensus was reached on any of those suggestions; however, Hartnagel created four subgroups to consider the suggestions and to report back by early June 1993. Group I, led by Waide, was to consider personnel issues. *Plaintiffs' Exhibit 38.*

A number of witnesses, including Hartnagel, testified that, although reductions in personnel were discussed in a general way at this meeting, there were no discussions of personnel reductions at particular work sites. Moreover, Carroll testified that he mentioned CTP at this meeting, but offered no details as to its operation.[5] Carroll testified that he knew, after reviewing Hartnagel's memo of May 7, 1993, *Plaintiffs' Exhibit 38,* that CTP would likely be used at some plant or plants. He did not know which plants would be affected, however.

Following the May 6-7, 1993 meeting in Wilmington, Group I, which had been charged with formulating methods to reduce the cost structure of the Films SBU by $4-6 million by 1994, met in Baltimore on May 1213, 1993. Prior to that meeting, on May 10 or 11, 1993, Waide and Carroll met to plan the meeting. It was agreed that each plant site would be required to perform a "zero-based restructuring analysis." A zero-based restructuring analysis is a "bottom up" approach to the evaluation of a business and its needs. The approach

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[5] Other participants in the meeting, including Millikin, did not recall that CTP was even mentioned at the May 6-7 meeting.

requires, first, the definition of tasks that are absolutely essential to the business, *i.e.*, safety, environmental and customer needs, and then those tasks that are merely discretionary, *e.g.*, new product development. By determining the operating costs associated with both essential and discretionary functions, decisions regarding cost reductions may be rendered more meaningful. Hartnagel, Carroll and Waide testified that, although the approach contemplates elimination of *tasks,* it does not necessarily contemplate elimination of personnel who might be redeployed to other positions in the company.

The May 12-13 meeting in Baltimore included plant managers like Millikin. One plant manager (not Millikin) asked whether VSP/VRI would be used if it were determined, following the analysis, that personnel would have to be released. Carroll responded that only CTP could be used. Carroll then provided a summary of CTP. Carroll testified that he personally believed at that point that CTP would likely be offered at the Florence site, but that Circleville had only a 50/50 chance of utilizing CTP. Waide testified that he did not believe at that time that Circlevillle would be one of the affected plants.

It was also agreed at this meeting that the "Reconciliation Selection Process" ["RSP"] would be used as the tool by which the plant managers would determine who would be affected by CTP, in the event the zero-based restructuring analysis indicated that personnel must be released. Carroll explained that RSP is only one of three such tools: "Last In First Out" ["LIFO"] contemplates that least senior personnel leave first; "Qualified Based Selection" ["QBS"] requires that the requisite skills, knowledge and abilities of every job be identified and employees compete for such jobs in the restructured organization; RSP combines

elements of the other two and staffs positions in the restructured organization according to the following criteria: 1) critical skills employees would be retained; 2) employees with twenty-five or more years of service would be retained; 3) employees with less than 3 years of service would be "declared excess;" 4) employees with demonstrated outstanding performance would be retained; and 5) all remaining jobs in the restructured organization would be filled on a LIFO, or seniority, basis. By these criteria, neither plaintiff, who had more than 30 years of service, would qualify for participation in CTP.

By the conclusion of the May 12-13 meeting, each plant manager was expected to perform a zero-based restructuring analysis at his site and to create a new organization, using RSP to staff that new organization.[6]

Millikin assumed that there would be excess employees in the Mylar line at Circleville. Indeed, his own notes generated at that time, *Plaintiffs' Exhibit 24,* referred to 42 excess positions. However, Millikin did not at that time assume that Circleville employees would actually be laid off in light of Circleville's history of heavy attrition and potential for redeployment to other business lines. Moreover, Millikin affirmatively rejected the idea of CTP, as the program was then formulated, because of the devastating impact it would have on the ranks of younger, skilled professionals at Circleville. Millikin explained that the average age of the exempt employees at Circleville was 48; many were in their 50's. Millikin believed that CTP, as then formulated, would eliminate most of the younger employees and would lead

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[6] There was some dispute as to whether the plant managers were given a target budget with which to work; Millikin testified that he was not.

eventually to a site without skills. Rather, Millikin believed that Circleville could meet its financial goals, if over a longer period of time, without the use of CTP and by continuing to rely on attrition and redeployment to other businesses at Circleville.

Millikin's notes generated during the May 12-13 meeting, *Plaintiffs' Exhibit 24,* p. 943, contain the notation, "trade OK?" with arrows pointing to the two RSP categories dealing with years of service. He testified that this notation reflected his concerns about "mortgaging the future" at Circleville and his inquiry of Carroll in that regard. Carroll made clear that such an option would not be available. *Plaintiffs' Exhibit 25,* p. 943, reflects Millikin's notes generated immediately after the May 12-13 meeting. These notes appear to refer to a procedure whereby more senior employees could volunteer to take the CTP "package" of less senior employees excessed by CTP. Millikin testified that both exhibits reflect his efforts to anticipate an aggressive, and only speculative, approach to cost-cutting at Circleville, and did not reflect a conclusion on his part that any Circleville employees would actually be let go.

On May 14, 1993, *i.e.,* the date on which Bradney's retirement became effective, Millikin convened a meeting of his site leadership team at Circleville to communicate the results of the May 12-13, 1993 meeting in Baltimore and to plan the zero-based restructuring analysis. Millikin also reviewed with his team the CTP as then formulated.

On May 19, 1993, Millikin summarized the preliminary results of the zero-based restructuring analysis, which list those employees who would presumptively be excessed. None on the list had more than 14 years' experience. *Defendants' Exhibit P.* Millikin testified that these

results confirmed his belief that CTP, as then formulated, would "mortgage the future" of Circleville.

Both Waide and Carroll were aware of Millikin's concerns about the effect of CTP on Circleville. On May 21, 1993, Carroll met with William Reynolds, Director of Human Resources, to discuss the possibility of restructuring without decimating the pool of younger employees at Circleville. Reynolds agreed to seek corporate approval for some element of voluntariness in the implementation of CTP.

Group I met again on May 24-25, 1993, in Wilmington. Millikin presented the results of the zero-based restructuring analysis at Circleville. *Defendants' Exhibit R.* At some point, Carroll was called out of the meeting to speak with Reynolds, who communicated corporate approval to seek "expressions of interest" in participation should CTP be implemented at any plant. Carroll relayed that information to those attending the meeting. Millikin immediately left to call his plant, expressing concern for those Circleville employees in the process of, or contemplating, retirement.[7] At the conclusion of the May 24-25 meeting in Delaware, Carroll undertook to formulate guidelines for implementing a CTP that would accept expressions of employee interest. *See Defendants' Exhibit U.* Millikin testified that it was only on May 24, 1993, that he seriously considered utilizing CTP, as modified, at Circleville.

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[7] Funari had testified on deposition that Millikin made this call on approximately May 18. At trial, however, Funari recalled that the call occurred on May 24. In any event, the conversation occurred after both plaintiffs had retired.

Carroll met with various human resources managers on June 1-2 in Richmond, Virginia, to offer concrete guidance on the implementation of CTP, as modified.

The Films SBU Strategic Leadership Team then re-convened in early June 1993. Each of the four groups reported back their consensus recommendations on ways to achieve target cost reductions assigned to them. Sometime thereafter, Hartnagel formally authorized the restructuring of the Films SBU, utilizing the modified CTP. The actual decision to utilize CTP at any particular plant, however, remained with each plant manager.

Millikin announced his decision to implement CTP at Circleville on June 11, 1993, and sought employees' expressions of interest beginning that same date. *Plaintiffs' Exhibits 1, 3.* Robert Dillard, Business Services and Supply Chain Manager at Circleville, testified on deposition that he was surprised by the announcement in light of Circleville's history of attrition and hiring for the Teijin Joint Venture.[8] *Depo. of Robert Dillard,* at 143. After a day or two, and after reviewing the "revenue projections," Dillard concluded that attrition would not effect the necessary cost reductions. *Id.*, at 147.

On June 20, 1993, Millikin announced that Circleville would reorganize its Mylar operations and that its rolls would

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[8] Dillard, who did not participate in the decision to implement CTP at Circleville, *Depo.* of *Robert Dillard,* at 37, also testified that the decision to use CTP at Circleville was mandated by "Wilmington." *Id.*, at 31.

be reduced by 31 employees.[9] Indeed, this number was higher than other plants affected by CTP at that time. At the time CTP was implemented at Circleville, hiring for the Teijin Joint Venture continued.

II

A. Breach of Fiduciary Duty

Legal Standard

29 U.S.C. §1104(a) (1) imposes certain obligations on ERISA plan fiduciaries:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and
> (A) for the exclusive purpose of:
> (I) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. . . .

As a consequence of these obligations, "[m]isleading communications to plan participants 'regarding plan

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[9] Millikin also testified that more than 31 positions may have been declared excess and that some employees may have been redeployed to other businesses at Circleville.

administration (for example, eligibility under a plan, the extent of benefits under a plan) will support a claim for a breach of fiduciary duty.'" *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), *cert. denied,* 508 U.S. 940 (1993), quoting *Berlin v. Michigan Bell Telephone* Co., 858 F.2d 1154, 1163 (6th Cir. 1988). In *Berlin,* the Court concluded that misrepresentations, whether negligent or intentional, made to potential plan participants concerning a prospective or contingent ERISA plan, give rise to liability if the plan was under "serious consideration" at the time the representations were made. *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d at 1163-64. However, a plan administrator is not required to predict an eventual decision; rather the administrator must "fairly disclose[] the progress of its serious considerations to make a plan available to affected employees." *Drennan v. General Motors Corp.*, 977 F.2d at 251, citing *Berlin,* 858 F.2d at 1164.

Thus, the triggering event for establishing a breach of fiduciary duty for alleged misrepresentations concerning a benefit plan is "serious consideration." Any misrepresentations made after the plan undergoes serious consideration can constitute breach of fiduciary duty; however, "misrepresentations made before serious consideration trigger no such duty." *Muse v. IBM* Corp., 103 F.3d 490, 494 (6th Cir. 1996), *cert. denied,* 117 S. Ct. 1844 (1997). Indeed, in its earlier grant of partial summary judgment, this Court concluded that an employer has no fiduciary duty to make disclosures regarding employee benefit plans "until it first seriously considers implementing a benefit plan." (May 6, 1998 *Opinion and Order* at 20). "[W]hether a plan was under 'serious consideration' and any misrepresentations concerning the employer's consideration of a plan . . . [are] question[s] of fact." *Drennan v. General*

Motors Corp., 977 F.2d at 251; *Berlin v. Michigan Bell Telephone* Co., 858 F.2d at 1164.

The issue of determining when serious consideration occurs was discussed by the United States Court of Appeals for the Sixth Circuit in *Muse v. IBM Corp.*, *supra*. The Court in *Muse* held that serious consideration "does not apply until a company focuses on a particular plan for a particular purpose." *Muse*, 103 F.3d at 494. In that case, defendant IBM offered several voluntary early retirement programs to employees at its Lexington, Kentucky site. Each of the plaintiffs in the class had opted for early retirement pursuant to a plan available at the time. Approximately five months after plaintiffs' retirement, IBM offered yet another retirement plan with a greater monetary incentive. Plaintiffs alleged in *Muse* that they would have chosen to participate in the latest plan had IBM not negligently or intentionally misrepresented to plaintiffs that no additional retirement plan would be offered. IBM asserted that its consideration of the later plan was triggered by its decision to sell the Lexington site, which decision occurred after plaintiffs' retirement. In reviewing the evidence presented, the Sixth Circuit noted that, although IBM had contemplated the sale of its Lexington plant prior to plaintiffs' retirement, it was the actual decision to sell that caused IBM to "focus on this particular [retirement] plan for a particular purpose," thus amounting to serious consideration. *Muse v. IBM Corp.*, 103 F.3d at 494. Prior to that time, the Court concluded, IBM's consideration of a better retirement plan was not "for any reason other than to gain a general appreciation of its options." *Id.*

The Sixth Circuit once again addressed the concept of serious consideration in *McAuley v. IBM Corp.*, 165 F.3d 1038 (6th Cir. 1999). That case also centered on the retirement of a class of plaintiffs from the Lexington, Kentucky, IBM

plant. Plaintiffs had retired just prior to IBM's announcement of a plan that offered greater retirement benefits. One of the plans offered during plaintiffs' employment involved a preretirement leave of absence; the actual retirement date and benefits would be fixed at a later date in accordance with any IBM retirement plan then in existence. Plaintiffs claimed that, prior to their retirement, it had been represented to them that this option held no financial advantage; thus, plaintiffs retired under other plans and were therefore unable to take advantage of the enhanced retirement benefits of the new plan.

In determining when IBM had given serious consideration to the new plan, the Court in *McAuley* relied on *Muse v. IBM Corp., supra,* and on a three factor test established in *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533 (3rd Cir. 1996), *cert. denied,* 117 S. Ct. 1247 (1997) *("Fischer II")*. The *McAuley* court quoted from *Fischer II* in relevant part:

> Serious consideration of a change in plan benefits exists when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change . . . . [T]his formulation does not turn on any single factor; the determination is inherently fact-specific. Likewise, the factors themselves are not isolated criteria; the three interact and coalesce to form a composite picture of serious consideration. For purposes of discussion, we address each in turn.
>
> The first element, a specific proposal, distinguishes serious consideration from the antecedent steps of gathering information,

developing strategies, and analyzing options. A company must necessarily go through these preliminary steps before its deliberations can reach the serious stage. This factor does not mean, however, that the proposal must describe the plan in its final form. A specific proposal can contain several alternatives, and the plan as finally implemented may differ somewhat from the proposal. What is required, consistent with the overall test, is a specific proposal that is sufficiently concrete to support consideration by senior management for the purpose of implementation.

The second element, discussion for implementation, further distinguishes serious consideration from the preliminary steps of gathering data and formulating strategy. It also protects the ability of senior management to take a role in the early phases of the process without automatically triggering a duty of disclosure. This factor recognizes that a corporate executive can order an analysis of benefits alternatives or commission a comparative study without seriously considering implementing a change in benefits. Preliminary stages also may require interaction among upper level management, company personnel, and outside consultants. These discussions are properly assigned to the preliminary stages of company deliberations. Consideration becomes serious when the subject turns to the practicalities of implementation.

> The final element, consideration by senior management with the authority to implement the change, ensures that the analysis of serious consideration focuses on the proper actors within the corporate hierarchy. As noted, large corporate entities conduct regular or on-going reviews of their benefit packages in their ordinary course of business . . . . As a general rule, such operations will not constitute serious consideration . . . . Until senior management addresses the issue, the company has not yet seriously considered a change.
>
> Consideration by senior management is also limited to those executives who possess the authority to implement the proposed change . . . . It is sufficient for this factor that the plan be considered by those members of senior management with responsibility for the benefits area of the business, and who ultimately will make recommendations to the Board [of Directors] regarding benefits operations.

McAuley, 165 F.3d at 1043-44, quoting *Fischer II,* 96 F.3d at 1539-40.

In *McAuley,* the Sixth Circuit utilized the standards articulated in *Muse* and concluded that IBM had "focused on a particular plan for a particular purpose" when the Management Committee, a group with authority to approve changes, "considered plan options and directed personnel staff to proceed to a final design." *McAuley v. IBM Corp.*, 165 F.3d at 1044. The Court specifically held that the district

court had erred in finding serious consideration only when, at a later date, the finalized proposal was placed before the Management Committee. The Sixth Circuit explained that *Muse* does not "indicate that a finalized plan in its ultimate incarnation is necessary [for serious consideration] . . . . Instead, this court used the test of *focusing* on a particular plan for a particular purpose." *Id.* Utilizing the *Fischer II* test, the Court concluded that the same event amounted to serious consideration. *Id.* at 1045.

Application

In the case at bar, plaintiffs allege that, at various points in late 1992, and in February and March 1993, representations were made to employees that Circleville would not participate in CTP because of its hiring for the Teijin Joint Venture and because of the attrition rate at the site. Plaintiff Bradney also asked his supervisor about retirement incentives in April and May 1993 and was told that none were planned. In its grant of partial summary judgment, this Court concluded that serious consideration of CTP for the Circleville plant could not have occurred prior to May 6, 1993. *(Opinion and Order,* May 8, 1998, at 34). The Court also concluded that each plaintiff's actual retirement date is the appropriate date by which to determine whether defendants breached their fiduciary duties to that plaintiff. (*Id.* at 25). If DuPont was indeed seriously considering implementing CTP at Circleville, DuPont was "obligated to correct its past predictions that the Circleville plant would not offer [the CTP] once the validity of those predictions was undermined by serious consideration of [the CTP]." *(Id.* at 26).

In resolving the issue of when serious consideration of CTP for the Circleville plant occurred, the Court finds the

testimony of Millikin most instructive because the evidence clearly establishes that, as plant manager, the decision to use CTP at Circleville was ultimately made by him. In addition, the testimony of Hartnagel, Carroll, and Waide is likewise useful because of their involvement in the events leading to Millikin's decision to utilize CTP at Circleville. Plaintiffs contend that serious consideration of CTP "occurred no later than the May 6-7, 1993 [Strategic Leadership Team] meeting in Wilmington." (*Plaintiffs' Post Trial Brief* at 15). Plaintiffs specifically point to certain portions of the evidence in support of this position. Plaintiffs refer especially to, first, Hartnagel's directive, in connection with the May 6-7 meeting, that it was necessary to "get ahead of the curve;" second, to Dillard's testimony that attrition did not ultimately solve the cost problems at Circleville; and third, to Millikin's notes following the May 12-13 meeting, *Plaintiffs' Exhibits 24 and 25.*

The Court rejects plaintiffs' reliance on Hartnagel's use of the phrase "get ahead of the curve" as evidence that the CTP was being seriously considered for Circleville as of May 6-7, 1993. Under *Muse* and *McAuley, supra,* "serious consideration" requires consideration by someone with authority to implement the change. While the testimony establishes that Hartnagel had authority to approve CTP for the entire Films SBU, the evidence is clear that there was no mandate, as of May 7, 1993, from Hartnagel or any other corporate official that Circleville implement CTP; that decision could be made only by Millikin as plant manager at Circleville. Moreover, the Court rejects plaintiffs' reliance on the testimony of Robert Dillard as evidence that CTP was undergoing serious consideration beginning May 6-7, 1993.

First, Dillard had no authority with respect to, and had no role in, the decision to implement CTP. *Depo. of Robert*

Dillard, 31, 37. Furthermore, in testifying that attrition did not suffice to achieve the required cost-cutting at Circleville, Dillard was speaking in hindsight. Indeed, he was initially surprised when he first learned that CTP had been authorized at Circleville. *Id.*, at 143. It was only after several days, and after studying the plant's revenue projections, that he concluded that attrition would be inadequate. *Id.*, at 147. This *post hoc* justification, made by one not involved in the decision-making process, simply is not determinative of the issue of the point in time that the decision to implement CTP at Circleville was seriously considered.

Plaintiffs also argue that Millikin's testimony, that CTP was not seriously considered by him until May 24, is not credible. Plaintiffs first note that Carroll testified that he discussed CTP at the May 6-7 meeting, contrary to the testimony of Millikin. It follows, in plaintiffs' eyes, that CTP was therefore seriously considered at that time. First, only Carroll testified that CTP was discussed at the May 6-7 meeting; Millikin, Hartnagel and Waide all had no recollection of a discussion of CTP at the May 6-7 meeting. Moreover, even Carroll testified that the discussion was only general in nature and did not include even the most cursory explanation of CTP. His purpose in mentioning the program was only because, as of January 1, 1993, CTP was the only tool available within DuPont to address possible personnel reductions. Finally, even this general discussion of CTP says nothing about whether or not its implementation at Circleville was at that time under serious consideration by Millikin. The Court finds that CTP was in fact generally discussed at the May 6-7 meeting, but also concludes, in light of the *Muse* and *Fischer II* tests, that that general discussion failed to rise to the level of serious consideration. That discussion amounted, at most, to preliminary deliberation, *i.e.*, the stage of

gathering data and formulating strategy by those with authority to implement CTP.

Plaintiffs also argue that CTP was seriously considered at the May 12-13, 1993 meeting of Group I in Baltimore. Plaintiffs characterize as unworthy of credit Millikin's testimony that he did not, and could not, consider CTP until the results of the zero-based restructuring analysis had been ascertained. According to plaintiffs, it was known to all at the meeting that the zero-based restructuring analysis would inevitably result in excess personnel; to argue otherwise is specious. Moreover, plaintiffs refer to Millikin's personal notes, *Plaintiffs' Exhibits 24* and *25,* which were generated either during or immediately following the May 12-13 meeting, and which, according to plaintiffs, indicate that he seriously considered CTP as of May 13.

Millikin's notes indicate that he considered a reduction in personnel at Circleville. However, the Court concludes that this consideration does not rise to the level of "serious consideration" so as to trigger a duty of disclosure under ERISA. Millikin credibly described *Exhibits 24 and 25* as his preliminary efforts to formulate strategy and to anticipate the effects of the most aggressive cost cutting measures. His testimony is supported by the fact that his notes reflect a possible 31 percent reduction in the ranks of exempt employees of the Mylar line. However, as even plaintiffs concede, the zero-based restructuring analysis would provide some indication of the actual number of positions that would be excessed. This fact is critical for a plant which, like Circleville, has more than one line of business to which employees could be redeployed, and which has a high rate of attrition.

As of May 13, Millikin was engaged in the antecedent step of developing a strategy, gathering information and analyzing options. *See, McAuley,* 165 F.3d at 1044, 1045; *Fischer II,* 96 F.3d at 1539-40. Furthermore, Millikin testified that, as of May 19, 1993, when the results of the zero-based restructuring analysis were complete, *Defendants Exhibit P,* he remained convinced that CTP would not be viable for Circleville because the program, as then formulated, would decimate the ranks of younger, skilled employees.

Plaintiffs also challenge the credibility of Millikin's testimony that he believed, until May 24, 1993, that CTP would not permit a component of volunteerism that would enable employees nearing retirement age to participate in CTP and thereby insulate the ranks of the younger, skilled Mylar employees. Again, plaintiffs refer to Millikin's notes generated after the May 12-13 meeting, in which Millikin wrote, "trade OK?" in referring to the seniority categories affected by CTP, *Plaintiffs' Exhibit 24,* p. 943, and in which Millikin seemed to anticipate that senior employees could trade CTP "packages" with less senior employees targeted by CTP. *Plaintiffs' Exhibit 25,* p. 948. Plaintiffs also refer to DuPont documents promulgated in 1992 and early 1993 which generally described the newly-instituted CTP and which seem to contemplate a component of volunteerism. *Plaintiffs' Exhibits 40, 56, 70.*

The Court nevertheless finds Millikin's testimony in this regard credible. The corporate documents reflected in *Plaintiffs' Exhibits 40, 56, 70* are only the vaguest of articulations of CTP and were not generated for the purpose or in the context of an actual implementation of the program. The record is uncontroverted that the participants in the May 12-13 meeting agreed that any actual implementation of CTP,

if any plant managers chose to implement it, would utilize RSP, a standard that does not contemplate an element of volunteerism, as a "deselection" tool. *See, .e.g., Plaintiffs' Exhibits 24, 25.* Millikin's notes do not, in this Court's estimation, undermine the credibility of his testimony that he did not believe, until May 24, 1993, that CTP could include senior employees who volunteer to participate. *Plaintiffs' Exhibit 24,* which reflects Millikin's contemporaneous notes from the May 12-13 meeting, includes the phrase "trade OK?" in reference to the two seniority categories impacted by RSP. This appears to reflect the issue, which both Millikin and Carroll testified arose during the course of this meeting, of whether or not senior employees otherwise protected from lay-off by RSP could volunteer to participate in the program. Both also testified that the answer to all such questions was negative; their testimony in this regard is consistent with all other witnesses who either participated in that meeting or were familiar with the decision-making process that ultimately resulted in the implementation of CTP. Moreover, Millikin's characterization as merely speculative the concept of "package trade," *Plaintiff's Exhibit 25,* is supported by the fact that CTP, as ultimately implemented at Circleville, did not include that feature.[10] In any event, *Plaintiffs' Exhibits 24, 25* confirm Millikin's testimony that the impact of CTP on the ranks of the younger Mylar exempt employees at Circleville was a critical factor in his consideration of whether or not to implement the program at Circleville. Furthermore, *Defendants' Exhibit P,* the results of the zero-based

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[10] In a "package trade," the more senior, volunteer, employee would step into the shoes of, and receive the financial benefits of, the less senior employee whose job would thereby be saved. As actually implemented, those volunteering to participate in CTP apparently received financial benefits calculated by reference to their own employment history.

restructuring analysis utilizing RSP as a deselection tool and which identified a number of less senior employees, also supports Millikin's testimony in this regard. Finally, Carroll and Waide both testified that Millikin regarded this issue as crucial to Millikin's decision and that Millikin's concerns were justified in light of the original formulation of CTP after the May 12-13 meeting. It was on account of Millikin's concerns that Carroll consulted Reynolds on May 21, 1993 about incorporating a component of volunteerism into any implementation of CTP. As the record is clear, it was not until May 24, 1993 that Reynolds communicated to the members of Group I that Millikin's request for a component of volunteerism had been approved and that any implementation of CTP could include a "solicitation of interest."

The Court concludes that Millikin's consideration of the application of CTP at Circleville prior to May 24 amounted to only a preliminary stage in the process rather than serious consideration. As the *Fischer II* court stated, corporate executives can order an analysis of benefits and interact with each other in their deliberations without triggering a duty of disclosure. In contrast, "[c]onsideration becomes serious when the subject turns to the practicalities of implementation." *Fischer II,* 96 F.3d at 1540. The Court concludes that, in the case at bar, consideration of CTP for Circleville became serious at the meeting of Group I on May 24, 1993, when Carroll announced that Reynolds had approved the solicitation of "expressions of interest" in connection with any implementation of CTP. Millikin credibly testified that this was the first time that he thought that CTP could be appropriate for the Circleville plant. It was only at this point that the CTP proposal was sufficiently concrete to support consideration by those with authority to implement it; as of May 24, 1993, Millikin "focused on a particular plan for

a particular purpose," thereby giving serious consideration to CTP. Prior to that date, defendants had no duty of disclosure to plaintiffs or to any other Circleville employees. As the Sixth Circuit cautioned in *Swinney v. GM Corp.*, 46 F.3d 512 (6th Cir. 1995), the duty of disclosure does not impose upon the employer a duty of "'clairvoyance; *i.e.*, to predict accurately the future availability of benefits.'" *Id.* at 520, quoting *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154, 1164 (6th Cir. 1988).

In sum, plaintiffs have failed to persuade the Court that serious consideration of CTP for Circleville occurred prior to May 24, 1993. Consequently, plaintiffs' claims of breach of fiduciary duty in failing to disclose plans to implement CTP must fail.

B. Discrimination

Plaintiffs also claim that DuPont violated 29 U.S.C. §1140. This section of ERISA prohibits discrimination "against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . . " 29 U.S.C. §1140.

In order to establish a violation of this section, plaintiffs must show that there was: "'(1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee[s] may become entitled.'" *Humphreys v. Bellaire,* 966 F.2d 1037, 1043 (6th Cir. 1992), quoting *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3rd Cir. 1987). Plaintiffs must establish that the defendants formed the specific intent to violate ERISA in order to establish a violation of §1140. *See, Id.* While

plaintiffs need not establish that the defendants' sole purpose was to interfere with plaintiffs' pension benefits, they must establish that such an improper purpose was a "motivating factor" in the decision. *Id.*, citing *Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 127 (7th Cir. 1991). Furthermore, the temporal proximity of the alleged illegal conduct to the employees' eligibility for the benefit creates at least some inference of intentional prohibited activity. *Id.* at 1044; *Sahid v. Ford Motor Co.*, 76 F.3d 1404, 1413 (6th Cir. 1996). If the plaintiffs establish a *prima facie* case, the burden then shifts to the defendants to introduce admissible evidence of a "legitimate, nondiscriminatory reason for [their] challenged actions." *Id.*, citing *Gavalik*, 812 F.2d at 853.

Plaintiffs argue that DuPont engaged in discrimination violative of §1140 when DuPont officials made repeated statements that Circleville would never[11] offer an early retirement incentive as long as it was hiring for the Teijin Joint Venture. Defendants argue that, in the absence of serious consideration of CTP, the statements, even if made, were not misrepresentations and did not violate §1140. This Court agrees. Based on the evidence presented, plaintiffs have failed to meet their burden of establishing that the statements regarding Circleville's participation in CTP were made with any intent to interfere with plaintiffs' retirement benefits. In sum, plaintiffs' discrimination claims under §1140 are likewise without merit.

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[11] As stated in this Court's May 6, 1998 *Opinion and Order*, whether the term "never" was used is of no significance. Based on the evidence presented, the Court concludes that this term was not in fact used; rather, plaintiffs were told that it was not foreseeable that CTP would be offered in light of the hiring opportunities and anticipated rate of attrition at Circleville.

C. Equitable Estoppel

Plaintiffs also claim that DuPont should be equitably estopped from denying plaintiffs benefits under the CTP. The United States Court of Appeals for the Sixth Circuit has held that, generally, "because of federal preemption under 29 U.S.C. §1144, state law theories, including estoppel, cannot support a claim for benefits under an ERISA plan." *Bond v. GM Acceptance Corp.*, No. 96-3945, 1998 WL 58256, at *3 (6th Cir. Feb. 5, 1998); *see also Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991). In *Bond,* plaintiffs sought to participate in a pension plan offered following their retirement; plaintiffs alleged that it was only misleading statements made prior to their retirement that foreclosed their participation in the later plan. Relying *on Armistead v. Vernitorn Corp.*, the Court held that, because plaintiffs' claim essentially sought to expand the coverage previously offered, rather than to clarify an ambiguous plan provision, plaintiffs' claim was subsumed in their claim for breach of fiduciary duty under §1104. Furthermore, in *Muse v. IBM Corp.*, 103 F.3d 490 (6th Cir. 1996), the Court held that "[s]tate law claims based on an employer's alleged misrepresentations about the availability of a benefit plan are sufficiently 'related to' an ERISA plan to be preempted by the statute." *Id.* at 495, citing *Swinney v. GM Corp.*, 46 F.3d 512 (6th Cir. 1995).

The Court concludes that *Bond* and *Muse* are controlling in the instant action. Plaintiffs' claims for equitable estoppel are subsumed in their breach of fiduciary duty claims and are therefore not separately actionable. Even assuming that plaintiffs' equitable estoppel claims were actionable, they would nonetheless fail because, as this Court concluded *supra,* the statements by DuPont officials, which plaintiffs characterize as misrepresentations, were in fact

accurate when made. In sum, plaintiffs' equitable estoppel claims are without merit.

CONCLUSIONS OF LAW

The Court concludes that plaintiffs' claims against DuPont for breach of fiduciary duty, discrimination and equitable estoppel are without merit. It is therefore **RECOMMENDED** that **FINAL JUDGMENT** on all of plaintiffs' claims be entered in favor of defendants.

If any party seeks review by the District Judge of this *Report and Recommendation,* that party may, within ten (10) days, file and serve on all parties objections to the *Report and Recommendation,* specifically designating this *Report and Recommendation,* and the part thereof in question as well as the basis for objection thereto. 28 U.S.C. §636 (b) (1) .

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in waiver of the right to *de novo* review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation. See Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Federation of Teachers, Local 231, etc.*, 829 F.2d 1370 (6th Cir. 1987); *Harris v. City of Akron*, 20 F.3d 1396 (6th Cir. 1994).

/s/_____
Norah McCann King
United States Magistrate Judge